

1 Jenny A. Covington SBN 233625
2 Molly Jean Given (Pro Hac Vice)
3 **NELSON MULLINS RILEY &**
4 **SCARBOROUGH LLP**
5 1600 Utica Avenue South, Suite 600
6 Minneapolis, MN 55416
7 Telephone: (612) 464-7626
8 Facsimile: (612) 255-7499
9 Email: jenny.covington@nelsonmullins.com
10 mollyjean.given@nelsonmullins.com

11 Jennifer T. Persky SBN 274804
12 **NELSON MULLINS RILEY &**
13 **SCARBOROUGH LLP**
14 19191 South Vermont Avenue, Suite 900
15 Torrance, CA 90502
16 Telephone: (424) 221-7400
17 Facsimile: (424) 221-7499
18 Email: jennifer.persky@nelsonmullins.com
19 Attorney for Defendants
20 THE COOPER COMPANIES, INC.
21 and COOPERSURGICAL, INC.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 F.G. and H.I., individually and on behalf of all
2 others similarly situated

3 Plaintiffs,

4 v.
5 COOPERSURGICAL, INC.; THE COOPER
6 COMPANIES, INC.; and DOES 1-10,
7 inclusive,

8 Defendants.

9 Case No. 4:24-cv-01261-JST

10 Assigned to: Judge Jon S. Tigar

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**PARTIES' JOINT SUBMISSION
CONCERNING PROPOSED CORRECTIVE
DISCLOSURE PER THE COURT'S ORDER
GRANTING IN PART AND DENYING IN
PART MOTION FOR PROTECTIVE ORDER
(ECF NO. 52)**

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1 Through this process, the parties have agreed on many aspects of the content of the disclosure.
 2 The parties propose a form of notice that would contain 1) for all individuals with whom Defendants
 3 communicated on or after March 1, 2024, the information the Court required concerning the filing of
 4 this action and Plaintiffs' counsel's contact information, along with a copy of the initial filing, and 2) in
 5 addition for only those individuals who executed releases on or after March 1, 2024, information
 6 concerning the voidability of those releases and what would happen with respect to any amounts paid
 7 pursuant to a later-voided agreement.

8 The lone remaining point of disagreement concerns the timing and contingency of voidability of
 9 such releases for the corrective notice sent to those who executed releases on or after March 1, 2024.

10 In particular, Plaintiffs interpret the Court's Order as allowing releases executed on or after
 11 March 1, 2024, to be voided effective immediately. Plaintiffs do not interpret the Order to condition the
 12 voidability of the releases on whether a class is ultimately certified (or whether an individual participates
 13 in any certified class). Defendants, meanwhile, interpret the Court's Order as making voidability of
 14 releases contingent and only "should a class be certified" of which the releasor would be a member, and
 15 that voidability would not apply to individuals who opt out of any certified class.

16 The parties provide below brief statements of and justifications for their respective positions,
 17 and they attach their competing versions of the proposed notice for the Court's consideration (Exhibits
 18 A and B) along with a version with competing positions (Exhibit C). Regardless of which version the
 19 Court adopts, CooperSurgical stands ready to send the approved corrective disclosure and to certify such
 20 on or before the Court's June 14, 2024, deadline.

21 **Plaintiffs' Position:** The Court should select Plaintiffs' version of the corrective notice, attached
 22 as **Exhibit A**, because it adheres to the Court's Order. Order, ECF No. 52 at 10. The Order directs that
 23 releases executed on or after March 1, 2024 "are voidable at the election of each settling putative class
 24 member." *Id.* at 11 (emphasis added). The Court reasoned that the releases "are voidable" now, without
 25 condition, because communications used to obtain those releases were misleading. *Id.* Defendants
 26 misinterpret the order to add a condition that does not exist — that the settlement agreements *will be*
 27 voidable *only if* the Court certifies a class action.

1 Defendants cite various out of circuit authorities to support their position that improperly
 2 obtained releases are only voidable if and when a court certifies a class. But courts in this District have
 3 not followed that path. *See, e.g., Cnty of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512, at *6 (N.D.
 4 Cal. July 8, 2010) (invalidating release prior to class certification, no corrective notice required); *Camp*
 5 *v. Alexander*, 300 F.R.D. 617 (N.D. Cal. 2014) (invalidating opt-out declarations prior to class
 6 certification and ordering corrective notice). In both *Astra* and *Camp*, the releases (or, in *Camp*, the opt-
 7 out declaration) were invalidated immediately because they were misleading, and therefore improperly
 8 obtained. Here it is the same: the releases are voidable now, at each putative class member's election,
 9 because they were obtained improperly.

10 Finally, Defendants urge this Court to follow the approach taken by *Friedman v. Intervet Inc.*,
 11 730 F. Supp. 2d 758, 767 (N.D. Ohio 2010), where the court waited until after class certification to
 12 decide whether to void releases. But this Court has already diverged with *Friedman* as it has already
 13 decided that the releases are voidable. The question now is when class members who signed a release
 14 can void it; not whether it is voidable.

15 **Defendants' Position:** Paragraph 6 of the Court's Order provided that "releases executed on or
 16 after [March 1, 2024] are voidable at the election of each settling putative class member." (ECF No. 52
 17 at 11.) It further provided: "Settling putative class members may elect to void an individual settlement
 18 agreement at any time through the end of the opt-out period, should a class be certified, or as otherwise
 19 ordered by the Court." (*Id.*) Defendants interpret this provision as allowing releases to be voided "should
 20 a class be certified," and submit that such interpretation is supported by the relevant case law, including
 21 case law on which the Court relied. Accordingly, Defendants request that the Court should select the
 22 corrective notice attached as **Exhibit B**.

23 *Friedman v. Intervet Inc.*, which the Court's Order cited multiple times, addressed a similar
 24 situation concerning communications that took place after the filing of a putative class action. 730 F.
 25 Supp. 2d 758 (N.D. Ohio 2010). As here, the court there found the communications at issue "misleading,
 26 but neither coercive nor abusive," and therefore imposed only minimal limitations on the defendants'
 27 communications with putative class members. *Id.* at 766. The court there also noted "the difficult path
 28 plaintiff must tread for class certification" in that products liability class action, *id.* at 767—similar to

1 this Court's agreement that "the Supreme Court has cautioned that personal injury claims may not be
 2 suitable for class certification because they 'present 'significant questions, not only of damages but of
 3 liability and defense of liability . . . affecting [individual class members] in different ways.' (ECF No.
 4 52 at 5–6 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997))).

5 As here, the *Friedman* court was asked to void any releases signed by individuals before they
 6 received notice of the putative class action. The court declined the request to void such releases
 7 immediately, and instead ruled that "the proper time for any such inquiry is *after* class certification, as
 8 invalidation of settlements is a drastic step that I do not intend to take lightly." 730 F. Supp. 2d at 767.
 9 The court also acknowledged "the onerous nature of setting aside settlements previously obtained" as
 10 well as "defendant's significant rights relevant to this issue." *Id.* at 768.

11 The *Friedman* court's wait-and-see approach with respect to potential voidability of releases is
 12 consistent with numerous courts' holdings. For example, in *Tolmasoff v. Gen. Motors, LLC*, addressing
 13 a similar situation, the court observed that instead of allowing immediate invalidation or voiding of
 14 releases pre-certification, "courts have held that the appropriate solution is to wait until after the class is
 15 certified and then include a statement in the class-action notice stating that the court will entertain
 16 applications to void any releases previously signed." No. 16-11747, 2016 WL 3548219, at *15 (E.D.
 17 Mich. June 30, 2016) (citing cases). Other courts have observed the same, agreeing that the "better time
 18 to inquire as to whether *any* settlement agreements should be voided is *after* class certification." *In re*
 19 *Midwestern Pet Foods Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 321CV00007RLYMPB, 2021 WL
 20 12248951, at *7 (S.D. Ind. Aug. 10, 2021); *also Jin Nakamura v. Wells Fargo Bank, Nat'l Ass'n*, No.
 21 17-4029-DDC-GEB, 2018 WL 994706, at *9 (D. Kan. Feb. 21, 2018) ("Nonetheless, the Court notes
 22 that other courts dealing with similar situations have opted, in lieu of unilaterally invalidating releases,
 23 to wait until after the class is certified and include a statement in the certification notice stating the court
 24 will entertain applications to void any releases previously signed at that time.").

25 Such a cautious approach makes sense in light of the reasoning behind requiring communications
 26 concerning releases to provide notice of a pending class action—to advise the putative class members
 27 they may be "giving up the right to participate *in a putative class action.*" (ECF No. 52 at 5 (emphasis
 28 added; citing *Friedman*, 730 F. Supp. 2d at 764).) Indeed, as in *In re Currency Conversion Fee Antitrust*

1 *Litig.* (which the Court also cited), the agreements with putative class members at issue were deemed
 2 improper because the defendant did not advise those individuals that by “failing to reject the arbitration
 3 clause, they were forfeiting their rights as potential plaintiffs *in this litigation*”—i.e., in the putative class
 4 action. (*Id.* (citing 361 F. Supp. 2d 237, 251 (S.D.N.Y. 2005))).

5 There is no justification, however, for allowing someone who signed an individual release
 6 agreement to void that agreement before class is ever certified. If there is no class certified, or no such
 7 class of which they would be a member, then the releasor has forfeited nothing. Instead, the releasor
 8 would be in no different position than if no class action had ever been filed.

9 This is why the *Friedman* court and many others advocate for waiting until *after* a class is
 10 certified—to avoid invalidating or voiding releases for no reason where a class is never certified and the
 11 releasor has forfeited nothing in terms of participating as a class member. *E.g., Jin Nakamura*, 2018 WL
 12 994706, at *9 (“And, if certification is not granted, it avoids Wells Fargo having paid out settlement
 13 money without any valid releases being executed.”).

14 Finally, Plaintiffs’ proposed version for the corrective disclosure would allow releasors not only
 15 to void their releases before any class is ever certified, but also to do so where they opt out of a certified
 16 class to pursue their claims individually. But just as there is no reason to invalidate or void a release
 17 unless and until a class is actually certified, there is likewise no reason to allow a releasor to void their
 18 release if they have opted out the certified class and instead intend to pursue their claims by an individual
 19 action. Again, the whole point of finding certain communications with and releases from putative class
 20 members to be improper and voidable is where they fail to apprise individuals they may be giving up
 21 rights to participate in a putative class action. Where the individual merely wants to pursue an individual
 22 action and does not want to participate as member of the class, there is no basis to void the release.

23 Therefore, Defendants ask the Court to approve and adopt their version of the corrective
 24 disclosure, including the provisions with respect to settling parties, and in so doing to clarify that releases
 25 may be voidable *only* if a class is certified, and only then as to releasors who are members of the class
 26 as certified and who do not opt out.

CONCLUSION

For the foregoing reasons, the parties respectfully request the Court to approve and adopt their respective versions of the curative disclosure attached to this submission.

DATED: June 3, 2024

Respectfully submitted,

BY: /s/ Jenny A. Covington

Jenny A. Covington,
Molly Jean Given (Admitted *Pro Hac Vice*)
NELSON MULLINS RILEY &
SCARBOROUGH LLP
1600 Utica Avenue South, Suite 600
Minneapolis, MN 55416
Telephone: (612) 464-7626
Facsimile: (612) 255-7499
Email: jenny.covington@nelsonmullins.com

Jennifer T. Persky SBN 274804
**NELSON MULLINS RILEY &
SCARBOROUGH LLP**
19191 South Vermont Avenue, Suite 900
Torrance, CA 90502
Telephone: (424) 221-7400
Facsimile: (424) 221-7499
Email: jennifer.persky@nelsonmullins.com

Attorneys for Defendants

DATED: June 3, 2024

BY: /s/ Dena C. Sharp (with permission)
Dena C. Sharp (State Bar No. 245869)
Adam E. Polk (State Bar No. 273000)
Nina R. Gliozzo (State Bar No. 333569)
GIRARD SHARP LLP
601 California Street, Suite 1400
San Francisco, CA 94108
Telephone: (415) 981-4800
Facsimile: (415) 981-4846
dsharp@girardsharp.com
apolk@girardsharp.com
ngliozzo@girardsharp.com

Joseph G. Sauder
Matthew D. Schelkopf
Juliette T. Mogenson
SAUDER SCHELKOPF LLC
1109 Lancaster Avenue
Berwyn, PA 19312
Tel: (888) 711-9975
Facsimile: (610) 421-1326
Email: jgs@sstriallawyers.com
Email: mds@sstriallawyers.com
Email: jtm@sstriallawyers.com

Attorneys for Plaintiffs and Proposed Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 3, 2024, I electronically filed the foregoing document entitled ***PARTIES' JOINT SUBMISSION CONCERNING PROPOSED CORRECTIVE DISCLOSURE PER THE COURT'S ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR PROTECTIVE ORDER (ECF NO. 52)*** with the Clerk of Court using the CM/ECF System, which will send a notice of electronic filing to all Counsel of record in this action.

/s/ Jenny A. Covington

Jenny A. Covington